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IN THE
COURT OF APPEALS OF INDIANA

NANCY L. JONES,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 35A02-0509-CV-836
	)	
ROBERT W. JONES,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Mark A. McIntosh, Judge
Cause No. 35C01-0309-DR-413

September 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Nancy L. Jones ("Wife") appeals the division of the marital estate following the dissolution of her marriage to Robert W. Jones ("Husband"). We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife married on March 31, 1995. Both were in their fifties, and each had adult children from previous marriages. Each party brought some assets to the marriage. When they married, Husband was working for Thomson Electric ("Thomson") and farming land he owned, and Wife was working as a cashier at Marsh. Within one year of marriage, Wife stopped working and became a homemaker. Husband worked at Thomson until the plant closed, around the time of the divorce, and continues to farm his land.

On January 12, 2004, Husband petitioned for divorce. Wife requested the court enter findings of fact and conclusions of law with its judgment. The court conducted a final hearing and ordered the parties to submit proposed findings. It adopted Husband's findings and conclusions verbatim, except that the court ordered Husband to pay $7,500.00 of Wife's attorney fees and costs.

Wife filed a motion to correct error. The court held a hearing, but did not enter an order, so the motion was deemed denied thirty days after the hearing.

DISCUSSION AND DECISION

Because the trial court entered findings and conclusions, we apply a two-tiered standard of review. *In re Marriage of Turner*, 785 N.E.2d 259, 263 (Ind. Ct. App. 2003). We first determine whether the evidence supports the findings, and then we determine

whether the findings support the conclusions. *Id.* We may reverse only if the evidence does not support the findings or the findings do not support the judgment. *Id.* However, where, as here, the trial court adopted one party's proposed findings and conclusions, it diminishes our confidence the judgment was based on the trial court's independent evaluation of the evidence. *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273 n.1 (Ind. 2003).

A trial court has discretion to divide assets between divorcing parties. *Akers v. Akers*, 729 N.E.2d 1029, 1031-32 (Ind. Ct. App. 2000). Even if the facts and reasonable inferences might allow us to reach a conclusion different than did the trial court, we will not substitute our judgment for that of the trial court unless its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We consider only the evidence favorable to the judgment. *Goodman v. Goodman*, 754 N.E.2d 595, 599 (Ind. Ct. App. 2001), *reh'g denied*. We may not reweigh the evidence or reassess the credibility of the witnesses. *Akers*, 729 N.E.2d at 1032.

A party challenging a property division must "overcome a strong presumption that the court considered and complied with the applicable statute." *Id.* (quoting *In re Marriage of Bartley*, 712 N.E.2d 537, 542 (Ind. Ct. App. 1999)). We consider the court's disposition of marital property "as a whole, not item by item." *Krasowski v. Krasowski*, 691 N.E.2d 469, 473 (Ind. Ct. App. 1998). When we review the division, our focus is on what the court did, not what it could have done. *Akers*, 729 N.E.2d at 1032.

A. Division of Assets

Indiana subscribes to the "one-pot" theory of marital possessions. *See Fobar v. Vonderahe*, 771 N.E.2d 57, 58 (Ind. 2002) ("Property owned by either spouse before the marriage is included in the marital estate and subject to division and distribution."); *Thompson v. Thompson*, 811 N.E.2d 888, 912 ("'one-pot' theory specifically prohibits the exclusion of any asset"), *reh'g denied* 820 N.E.2d 181 (Ind. Ct. App. 2004), *trans. denied* 831 N.E.2d 740 (Ind. 2005). Marital assets include property:

(1) owned by either spouse before the marriage;
(2) acquired by either spouse in his or her own right:
    (A) after the marriage; and
    (B) before final separation of the parties; or
(3) acquired by their joint efforts.

Ind. Code § 31-15-7-4(a). The court's goal is to divide the marital property in a just and equitable manner, Ind. Code § 31-15-7-4(b), and we presume just and equitable division is equal division between the parties. Ind. Code § 31-15-7-5.

If one party feels equal division is not just and equitable, that party may rebut the presumption of equal division by presenting evidence regarding the following factors:

(1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
(2) The extent to which the property was acquired by each spouse:
    (A) before the marriage; or
    (B) through inheritance or gift.
(3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
(4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
(5) The earnings or earning ability of the parties as related to:

(A) a final division of property; and
(B) a final determination of the property rights of the parties.

Id. If a trial court determines one party met its burden to prove the marital pot should be divided unequally, the court must set out specific findings to support deviating from the presumption of equal division. *Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998).

The trial court entered specific findings to justify its unequal division of assets:

F. **REASONS FOR ORDERED DIVISION OF ASSETS AND DEBTS.**

1. An equal division of all assets owned by the parties, including those items which both parties brought into the marriage, would not be just and reasonable. I.C. 31-15-7-5[.]
2. Robert W. Jones is solely responsible for the financial contribution necessary for the acquisition of Real Estate Parcels C, D, E, and F. I.C. 31-15-7-5(1)(2)[.]
    (A) Each parcel was purchased prior to the marriage of Robert and Nancy.
    (B) Each parcel was purchased by Robert together with his first wife, Patricia, who died of cancer in January 1992.
3. Although [R]eal Estate Parcels A and B were purchased during the marriage of Robert and Nancy, Robert W. Jones was primarily and completely responsible for all loan payments and real estate taxes during the course of the marriage through the sale of farm crop proceeds and cash from Husband's employment with Thomson. I.C. 31-15-7-5 (1)(2).
4. Robert W. Jones is solely responsible for the financial contribution necessary for the acquisition of all items of personal property listed in Petitioner's Exhibit 4 and has agreed to be solely responsible for any debt associated with these items of personal property. I.C. 31-15-7-5(1)(2).
5. A forced sale or liquidation of these assets would result in recapture of income for previously depreciated farm equipment and machinery items. I.C. 31-15-7[.]
6. The following property items were acquired by Robert W. Jones prior to the marriage of Robert W. Jones and Nancy L. Jones :I.C. 31-15-7-5(1)(2)[.]

(A) Real Estate Parcels C, D, E, and F.
(B) All personal property items (farm machinery and equipment) listed in Petitioners Exhibit 4 except for current motor vehicles.
(C) Hartford IRA – formerly Putnam
Thomson savings account
Edward Jones IRA-Robert
Thomson Pension Plan-Accrued
Thomson Pension Plan-Transition
Beacon accounts
(D) All parts of current retirement and investment accounts that were a result of Robert's employment with RCA prior to its sale to Thomson in 1987. Robert['s] employment with RCA started in 1966.

7. Any division of property should exclude the value of any asset at the time of the marriage of Robert and Nancy in March 1995. I.C. 31-15-7-5(2)[.]
8. The economic circumstances of each spouse at the time of disposition of the property is to become effective is such that the division outlined in this Order is fair and reasonable. I.C. 31-15-7-5(3).
9. Robert W. Jones is the only party who has the earnings ability to the [sic] repay the real estate debt and farm-related operating and equipment debts. I.C. 31-15-7-5(5).
10. Robert W. Jones is a life-long farmer and farms all the tillable acreage included in this order.

(Appellant's App. at 14-15.)

Wife first asserts the court's finding F.7 indicates it took Ind. Code § 31-15-7-5-(2) "as a mandate to exclude all premarital assets before any division should take place." (Appellant's Br. at 27.) We disagree with Wife's characterization. Section F of the court's order includes other findings explaining why those assets should be excluded. Accordingly, contrary to Wife's assertion, this case is not similar to *Wilson v. Wilson*, 409 N.E.2d 1169, 1171-75 (Ind. Ct. App. 1980), *reh'g denied*, in which the trial court

excluded all gifts and inheritance without including findings to explain why that division was just and reasonable.

Wife also asserts a number of the findings in Section F are erroneous. She claims paragraphs F.3 and F.4 "totally ignore substantial evidence in the record of [Wife's] contribution to the acquisition of marital assets as a homemaker." (Appellant's Br. at 29.) She argues her "contributions to the acquisition of marital assets are entitled to consideration." (*Id.* at 30.) We agree that her contributions are entitled to consideration, but we disagree with her conclusion the court ignored her contributions. The court's order attempts to divide equally between the parties the value of all assets acquired during the marriage, including the increased equity on the properties Husband brought to the marriage.[1] Accordingly, the court considered her contributions.

Wife claims the trial court erred by considering "Non-Statutory Factors" in its determination that the facts supported unequal division of the marital estate. However, the controlling statute does not so limit what the court may consider. The presumption of equal division of marital property "may be rebutted by a party who presents relevant evidence, *including evidence concerning the following factors*, that an equal division would not be just and reasonable." Ind. Code § 31-15-7-5 (emphasis added). Because the legislature used the words "including evidence concerning the following factors," the list of factors provided is non-exclusive. *See In re Lehman*, 690 N.E.2d 696, 702 (Ind.

[1] The court did not, for example, set aside to Husband the value of all properties he brought to the marriage and then also award to Husband 80% of the amount by which those properties increased in value during the marriage.

1997) (noting Professional Conduct Rule 1.5(a), which includes the phrase "factors to be considered in determining the reasonableness of a fee include the following," provides a "nonexclusive list" of factors to consider). Accordingly, the findings regarding facts other than those listed in the statute do not demonstrate the court "misinterpret[ed] the law." (Appellant's Br. at 31.)

Finally, Wife challenges paragraph F.8, in which the court found the economic circumstances of the parties support the adopted method for dividing the property. Assuming *arguendo* the evidence does not support that finding, we cannot find in light of the court's other findings that the court abused its discretion when it determined equal division of all marital assets was inappropriate. Husband brought to the marriage significantly more assets than did Wife; while Husband received the value of those assets upon dissolution, he also received the associated debts.

B. Valuation of Assets

Wife claims that, even if the court could exclude from division the value of all assets at marriage, it erroneously valued some of the assets it included in the marital estate. The valuation of assets is within the trial court's broad discretion. *Thompson*, 811 N.E.2d at 916. The court has not abused its discretion if its valuation is supported by evidence, or the reasonable inferences therefrom, in the record. *Id*.

Husband received a "Transition Benefit" pension from Thomson. The court's order sets the value of that account over to Husband and does not include any of the value in the marital assets because the money is "from RCA employment" prior to marriage.

(*Id.* at 10.) That was error. The pension may have been based on Husband's pre-marital employment with RCA, but the Account Statements indicate:

> You earn a portion of your Transition Benefit each month you continue in employment with Thomson. Your Transition Benefit is fully earned at age sixty (60), provided you remain continuously employed by Thomson until that time.

(Appellant's App. at 55-56.) As explained by the "Thomson Consumer Electronics, Inc. Pension Plan for Employees Statement of Account Questions and Answers," if an employee leaves the company before age 60, he would "forfeit the unearned portion of [his] Transition Benefit." (*Id.* at 58.) Accordingly, Husband's assertion and the trial court's conclusion that the entire value of the Transition Benefit was earned prior to the marriage is unsupported by the evidence. If Husband had not remained employed at Thomson, he would not have received the unearned portion of the Transition Benefit. Therefore, the portion of the Transition Benefit Husband earned after marriage should have been included in the marital assets the court was dividing.

Husband reached age sixty in 1993 or 1994, and he admitted at trial that his Transition Benefit was not fully vested until near the time of the divorce. The value of the "Earned Transition Benefit" at marriage was $26,258.35 (*id.* at 55), while the value at divorce was $96,118.92. (*Id.* at 56.) Accordingly, the difference, $69,860.57, should have been included in the balance sheet of assets the court was dividing.

In addition, the trial court erroneously included Wife's IRA in the marital estate. Both parties testified the money in Wife's IRA was "from her ex-husband's" retirement account. (*Id.* at 113) (testimony of Husband). While the IRA was not set up until during

this marriage, Wife's right to the assets in that IRA accrued prior to this marriage.[2] In light of the court's stated intent to divide only those assets that accrued during the marriage, the entire value of this IRA should not have been included in the marital estate. Rather, the court should have included only the increase or decrease during the marriage in Wife's share of her ex-husband's retirement benefits. On remand the court should determine how much the value of the assets in this account would have increased between March of 1995 and January 2004, and then include only that amount in the balance sheet of items being divided between the parties.

Next, Wife challenges the valuation of a number of pieces of farm equipment Husband owned. She claims she should not be "required to reimburse" Husband for the depreciation of those assets. (Appellant's Br. at 40.) In light of the method the court was using to divide the marital assets, we cannot say it abused its discretion in calculating those values. The court's methodology was to divide equally the difference between the value of assets at separation and the value of assets at marriage. Many of the assets, for example the real property and investment accounts, increased in value during the marriage. However, the equipment, as is typical for machinery, decreased in value during the marriage. We cannot find error in the court's application of its methodology to the values of those assets simply because the application results in negative values.

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[2] This fact distinguishes Wife's IRA from Husband's Transition Benefit. While Husband's Transition Benefit may have been based on pre-marital employment, he had to remain employed at Thomson for the rest of the benefit to become vested. Wife's entitlement to the IRA, on the other hand, was entirely vested when her divorce was completed, and she simply needed her attorney to finish the paperwork to transfer that property from her ex-husband to herself.

Wife also challenges the court's valuation of Husband's Thomson Savings Account. The court accepted Husband's assigned value of negative $759.67. Wife asserts Husband "agreed" on cross-examination "the $8,379.81 date of separation value already included a deduction of the loan balance." (*Id.* at 41.) We have reviewed Husband's testimony and found no such "agreement" by Husband. Rather, Husband repeatedly testified he was "not sure where the figures come from," (Appellant's App. at 114), "not sure how they do that," (*id.*), and "not sure how they figured it." (*Id.* at 115.) Accordingly, the testimony regarding the value of that account was in conflict, and we will not reweigh the evidence. As there is evidence to support the trial court's valuation, it is not clearly erroneous.

Lastly, Wife notes the trial court incorrectly valued real estate parcels C, D, E, and F. The court subtracted the date-of-marriage combined value ($218,551) from the date-of-separation value ($381,283) and assigned that amount ($162,732) to Husband. The court also assigned the date-of-separation combined debt (negative $189,797) to Husband. The result was a negative value for those pieces of real estate of $27,065. As Wife notes, Husband's calculation, as adopted by the trial court, failed to account for the amount of debt at marriage, which Husband testified was $170,000.

Subtracting the date-of-marriage combined debt ($170,000) from the date-of-marriage combined value ($218,551) reveals a date-of-marriage equity of $48,551. Subtracting the date-of-separation combined debt ($189,797) from the date-of-separation combined value ($381,283) reveals a date-of-separation equity of $191,486. Setting aside to Husband the value of the property at marriage requires subtracting the equity at

marriage from the equity at separation, resulting in a marital increase in equity of $142,935. Accordingly, the value for Parcels C, D, E, and F in the Proposed Division of Part D of the court's order should have indicated Husband was receiving an asset that increased in value during the marriage by $142,935. In addition, as that calculation already accounts for the debt on those properties, the "Community Credit Debt-Home and Jones farms C&D and E&F" should be $0.

To summarize, our correction of mathematical errors in the findings submitted by Husband and adopted by the court results in the following modifications to the Proposed Division in Section D.1 of the court's order:[3]

ASSET-DEBT	**HUSBAND**	**WIFE**
Edward D. Jones – Wife dos value ?????? less dom value ?????? Marital increase ????		???? marital increase in value
Parcels A & B – net dos value 110,509 less dos debt 104,219 6,290	6,290	
Parcels C, D, E, F – dos equity 191,486 less dom equity 48,551 Marital increase 142,935	142,935	
1996 Pontiac Bonneville		5,000
Personal Property Farm machinery & equipment	(24,150)	

[3] In the table, "dos" stands for "date of separation" and "dom" stands for "date of marriage." Parenthesis indicates a negative value.

Case C60 tractor	3,348.82	
6620 Combine	(3,771.25)	
Beacon Credit Union-Checking	15,361.71	
Beacon Credit Union-Savings	27.03	
Thomson pension plan-Husband	48,085.82	
Thomson transition benefit – Husband	69,860.57	
Thomson savings account	(759.67)	
Hartford (Putnam) IRA – Husband	32,948.31	
Property equalization payment		??????
TOTAL	290,176.34	5,000

Using the values now in the table, Husband is receiving $290,176.34 and Wife is receiving $5,000. The court's stated goal was to divide equally between the parties the changes in the values of assets between marriage and separation. Accordingly, if the court determines the assets in Wife's IRA did not increase between marriage and separation,[4] then Husband and Wife should each receive half of the total changes in value. The total change is $295,176.34, and half that amount is $145,588.17. To

[4] When calculating this increase, the court must keep in mind that Wife arrived at this marriage with a vested right to those assets from her ex-husband. Accordingly, the court should be subtracting from the date of separation value of the IRA the estimated value of the assets from her ex-husband's retirement that Wife had a right to at marriage. Further, the court may not, as indicated above, assign a date of marriage value of zero to this asset, because Wife had a vested right to the asset.

effectuate that division, Husband would owe Wife a property equalization payment of $140,588.17.

If the court assigns an increase in value to the assets in Wife's IRA, then the court will need to recalculate the equalization payment.

CONCLUSION

The evidence and findings support the trial court's decision to exclude from division the value of assets brought to the marriage. However, the evidence does not support the valuation of some assets. Accordingly, we affirm in part, reverse in part and remand for the trial court to enter an order in accordance with this opinion.[5]

Affirmed in part, reversed in part, and remanded.

CRONE, J., concurring.

FRIEDLANDER, J., dissenting with separate opinion.

[5] Husband requests we remand for the trial court to impose his appellate attorney fees on Wife pursuant to Ind. Code § 31-15-10-1. Because Wife's appeal was not without merit and because Husband has more assets and income than Wife, we decline his request.

IN THE
COURT OF APPEALS OF INDIANA

NANCY L. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 35A02-0509-CV-836
	)	
ROBERT W. JONES,	)	
	)	
Appellee.	)	

FRIEDLANDER, Judge, **dissenting.**

I agree with the majority on all matters except one – the valuation and disposition of the marital assets designated as Parcels C, D, E, and F. From its resolution of those matters, I respectfully dissent.

The respective valuations of those assets at the date of marriage (DOM) and the date of separation (DOS) are not in dispute. At the time of marriage, they had a combined value of $218,551. At the date of separation, their combined value was $381,283. The difference between those two values is the amount with which we are concerned in this appeal, i.e., the increase in value that occurred during the marriage. In my view, that amount must be reduced by the amount of indebtedness encumbering the properties at the date of separation, which was $189,797. For purposes of division of marital assets, this reduces the value of the assets to -$27,065. The foregoing tracks the

trial court's computations with respect to those assets and I agree with it in all respects. The trial court calculated the value for purposes of division by subtracting the DOM value from the DOS value, and subtracting from that the DOS indebtedness on the property. The majority concludes not only that this approach is erroneous as a matter of law, but also that the correct method is to subtract the net DOM value from the net DOS value. I believe the law does not *require* implementation of the latter formula, or even prefer it in this particular case.

The law confers broad discretion upon trial courts in dividing marital assets. *Lawson v. Hayden*, 786 N.E.2d 756 (Ind. Ct. App. 2003). Because each case presents unique facts and circumstances, no templates exist by which to decide the myriad and complex issues that arise when dividing marital property in a dissolution action. Rather, the trial court's charge is general in nature, i.e., to divide the marital property in a "just and reasonable manner." Ind. Code Ann. § 31-15-7-4(b) (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006). "Just and reasonable" must necessarily be defined on a case-by-case basis. A trial court has latitude in devising methods to accomplish that end. My research reveals there is no single, "correct" method of real property valuation. Our frequent use of the permissive "may" underscores this point. *See, e.g.*, *Doyle v. Doyle*, 756 N.E.2d 576, 579 (Ind. Ct. App. 2001) ("trial court *may* achieve a just and reasonable property division by …") (emphasis supplied).

In the instant case, Robert owned the property in question years before, and for the most part *many* years before, he married Nancy. The property included the marital residence and approximately 135 acres of mostly farmland. After they married in March

1995, Robert and Nancy moved into the home Robert had owned since 1969. The home had been extensively remodeled and was then in "good shape."[6] *Transcript* at 76. The home was situated on Parcel C.

For the duration of their marriage,[7] in addition to working full-time at Thomson Electronics, Robert farmed the land that comprised Parcels D, E, and F. With respect to the farming operation, Robert testified that income tax returns reflect the farming operation lost $40,000-50,000 per year for each of the preceding three or four years of the marriage. Nancy did not assist Robert in the farming operations. For her part, Nancy worked as a grocery store cashier at the time of the marriage, but quit that job approximately one year later. Nancy did not work outside the home after that. Nancy filed for divorce in March 2001, and again in November 2003, at which time she left the marital residence for good.

During the marriage, evidently at Nancy's request, the parties' finances were kept separate, especially with respect to the farming operation. Robert explained, "[E]verything on the farm and all my records were kept separate from Nancy's. And that's the way she wanted it. She didn't want to combine any of our record, and I thought

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[6] I note that shortly after Robert's marriage to Nancy, he completed what was to be the final remodeling project, this one a relatively minor one at the rear of the house. *Transcript* at 77. According to Robert, Nancy did not help him with that task, but instead "[s]at out in the lawn chair and watched." *Id.*

[7] The dissolution petition was filed on January 12, 2004; Robert retired from Thomson on June 14, 2004.

that was the best way too, even our retirement accounts. She signed waivers on the retirement accounts. I signed waivers on hers, as beneficiaries." *Id.* at 50. In January 2005, Robert borrowed $43,000 using his retirement fund as collateral. He used the money "to pay the farm payment, to pay legal fees, living expenses, pay off the operating loan so I could (indecipherable) another one, and – and also make the payments on the farm in April, also make the payments on the tractor in June." *Id*. at 47.

In assessing the value of Parcels C-F, the trial court accomplished what I believe was a fair and just result, based upon these facts. It set aside to Robert in its entirety the land he had purchased long before marrying Nancy – land that he alone, during his relatively brief marriage to Nancy, had labored to maintain. Moreover, it is significant to me that the farmland in question was part of a farming business that for the last three or four years of the marriage had operated at a significant loss. Against the aggregate amount of those losses, the value assigned to the asset by the majority's method seems greatly inflated.

This court has stated, "[i]n deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment." *Fobar v. Vonderahe,* 756 N.E.2d 512, 518 (Ind. Ct. App. 2001). This reflects that the threshold for reversal is set relatively high. The circumstances recounted above do not approach, much less cross, that threshold. In fact, in my view, these facts are easily sufficient to support the judgment. *See id*. at 523 (Fobar awarded property where "Vonderahe never used the property, contributed to any improvements thereon, or participated in any decisions concerning the property").

Mindful of our deferential standard of review, I would affirm the trial court's decision with respect to Parcels C-F.